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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2015

GEORGE ROBERT BOYKINS, et al.,

Petitioners,

v.

FAIRFIELD BOARD OF EDUCATION, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 74-

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals is reported at 492 F.2d 697 and is reprinted in the Appendix to this Petition, pp. 1a-17a. The opinions and orders of the district court are unreported and are reprinted in the Appendix at pp. 18a-26a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Following a disturbance at a recently desegregated public high school twenty-one students were suspended and

faced expulsion. At a hearing before the school board, hearsay, in the form of written statements, was introduced and relied upon by the board. Eight of the twenty-one were permanently expelled, although a number were shown to have done no more than others who were readmitted. The school board gave no reasons for singling out the eight, but apparently expelled them because they were believed to be leaders of the disturbance.

Were the eight permanently expelled students denied due process of law—including the right to cross-examine and confront witnesses—as guaranteed by the Fourteenth Amendment?

Constitutional Provision Involved

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

This case commenced as a school desegregation suit in 1965.[1] Petitioners are black school children who are mem-

[1] Reported decisions relating to desegregation are as follows: *United States* v. *Jefferson County Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385; *Boykins* v. *Fairfield Bd.*

bers of the class on whose behalf it was filed. They seek review of the decision of the Fifth Circuit which upheld their permanent expulsion from the schools of the City of Fairfield, Alabama. Following a remand in 1972, by the Court of Appeals, a final plan for the desegregation of the schools was put into effect by the district court.

However, in the fall term of 1972, difficulties arose with the implementation of the plan, which in turn resulted in dissatisfaction on the part of black students at Fairfield High School.[2] In late October and early November, 1972, black students conducted a boycott of the school. Motions were filed in the district court seeking to correct problems in implementing the desegregation plan and to reinstate students suspended because of the boycott. On November 9, 1972, the district court ordered that the suspended students be reinstated and set a hearing to review the problems that had given rise to the boycott. As part of its order, the district court required the students to end the boycott and return to class.

Nevertheless, difficulties persisted. On November 10, 1972, an incident occurred involving a black student and a black faculty member.[3] When other black students heard

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of Ed., 399 F.2d 11 (5th Cir. 1958); *Boykins* v. *Fairfield Bd. of Ed.*, 421 F.2d 1330 (5th Cir. 1970); *Boykins* v. *Fairfield Bd. of Ed.*, 429 F.2d 1234 (5th Cir. 1970); *Boykins* v. *Fairfield Bd. of Ed.*, 446 F.2d 973 (5th Cir. 1971); *Boykins* v. *Fairfield Bd. of Ed.*, 457 F.2d 1091 (5th Cir. 1972). As Judge Godbold noted in dissent, the desegregation of the school district "has been a fruitful source of litigation" because of the resistance to desegregation. 492 F.2d at 703, Appendix, p. 9a.

[2] The problems included the alleged inability of black students to participate as cheerleaders or as members of certain clubs, the administration of discipline, particularly as it regarded tardiness, and the lack of a Black Studies program.

[3] The student was Clarence Young, one of those subsequently expelled.

of the incident, a number of them left their classes. As a result, the principal decided to close the school and send all students home. Subsequently, notices were sent to twenty-one students informing them that they had been suspended for their actions of November 10 and would receive notices later as to Board of Education conducted hearings to decide whether they would be reinstated.

Before the hearings were held, a motion was filed in the district court challenging the suspension of the twenty-one students. Decision on the motion was deferred pending the outcome of the administrative hearings, which were held on November 25, 1972. (The transcript of the hearing was introduced in district court; record references herein are to the Appendix filed in the Court of Appeals, "A.")

As the hearing commenced, the board's attorney explained the procedure. He began by reading an excerpt from *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), including language to the effect that there was no right to cross-examination and that written testimony could be presented (A. 53). The attorney then continued with the statement quoted by the Court of Appeals at 492 F.2d 700. (See Appendix, *infra* at 4a-5a.) He said that the "School Administrator" presenting the evidence could be questioned by the school board and cross-examined by the attorney representing the children.[4]

However, as it developed, this purported right to cross-examine was illusory. Each student charged was called in with his or her parent and informed of the charges. The principal presented the evidence against the student, but

[4] Shortly thereafter, during a preliminary discussion regarding another procedural issue, the school board attorney stated: "'You can cross-examine . . . any person who has presented evidence" (A. 59).

with two exceptions[5] it was hearsay and consisted of written statements by teachers who were not available for cross-examination. In most instances the statement was limited to an assertion that the pupil either had not reported for class or had left class without permission.

While no overall objection was made to the introduction of this hearsay, on two occasions objections were made to specific testimony as hearsay (A. 73; 194). In any event, both the district court and the Court of Appeals ruled on and upheld the use of hearsay (Appendix, 5a-7a; 21a). And, as the appeals court noted in rejecting petitioners' claim, it had been the rule since 1961 in the circuit that hearsay in the form of written statements could be used under the decision in *Dixon* relied upon by the school board attorney.

After the principal had presented evidence each student was allowed to present his or her story as to what happened, although two of the expelled students were not present when their names were called at the school board hearing. It was clear that they had been waiting outside, but left sometime during the five-hour proceeding because they were not allowed to use the bathroom. Since they had no transportation, they had to walk home and had not returned by the end of the hearing (A. 338-339). Thus, the only testimony against them was hearsay in the form of a written statement from their first-period teacher alleging merely that they had left her class without permission.

Of the 21 students accused, four were readmitted immediately as of November 27, 1972; eight others were readmitted one week later as of December 4; one student was suspended for the remainder of the semester; and eight

[5] Clarence Young and Beverly Claiborne.

others, petitioners here, were expelled permanently. Since the school board did not state the reasons for its decisions, it gave no explanation for the disparate results. As Judge Godbold noted in dissent (492 F.2d at 705, Appendix, pp. 13a-14a), the only apparent basis for the expulsions was that the school board concluded that the eight were leaders in the disturbance. However, as he also correctly pointed out, there was nothing introduced at the board hearing that showed that most of those expelled did anything more than numerous other students who were readmitted (*Ibid.*)[6]

Indeed, given the evidence concerning the eight students selected for expulsion and the lack of explanation for their being so selected, Judge Godbold's conclusion that the penalties were arbitrarily severe because of their being based upon matters outside the record (Appendix, 15a) is unavoidable. Thus, Darlene Phelps and Cathy Scott testified that they had been given permission to leave their class (this testimony was corroborated by another student), contrary to the written statement of their teacher. They further denied doing anything disruptive. To the contrary, they had attempted to find a representative of the Community Relations Service of the United States Department of Justice, who had been sent to the school, to get his help in calming the situation.

Jacques Guest and Linda Meadows testified that they had left class because they had heard that another black student was in trouble. Guest admitted that he went to one class and told students that they should leave, but said it was the teacher who actually dismissed the class (A. 203-04). Miss Meadows was also accused in a written

[6] For example, the charge and evidence against Anthony Williams was exactly the same as against Cathy Scott and Darlene Phelps, *i.e.*, leaving Mrs. Sexton's class without permission (A. 329-330; see n. 18, *infra*). Nevertheless, Williams was readmitted to school and Phelps and Scott were permanently expelled.

statement from one of the teachers that when he told her to leave the classroom she cursed him. Miss Meadows, however, testified that she did not actually go into his classroom (although she was standing outside in the hall) and denied using profanity. The teacher himself did not testify (A. 131-32).

Beverly Claiborne was presented with a written charge that she failed to report to her first-period class. The principal also testified, based on his own knowledge, that when Miss Claiborne was told that she would be expelled she responded with profanity. Miss Claiborne, however, testified that she had in fact reported to her first-period class and had been excused by the teacher (A. 121.)[7] With regard to the profanity, she said that she made a statement to herself and did not expect it to be heard (A. 127).

Clarence Young was the student who had the altercation with a teacher that precipitated the disturbance. He had gotten into an argument over whether the teacher should apologize to a girl because he had accidentally hit her when he opened a door. Words were exchanged that included some insults by Young, and he was taken into the principal's office. He was there when the students began to leave their classes.

John Hall and Beverly Law were the two students who had left the hearing before their names were called. The only evidence was written statements that they had left class without permission; there was no testimony that they had gone to other classes or had done anything more than many of those readmitted.

The district court, in an order dated December 14, 1972, held that due process had been complied with and that the

[7] Another student, Beverly Williams was also accused of leaving the same class without permission. She also testified that she had been excused (A. 106). She was readmitted.

action of the school board was justified (Appendix, pp. 18a-23a).[8] A timely Notice of Appeal was filed on December 2, 1972.

In the meantime, the expelled students made efforts to continue their education. A number of them enrolled in private parochial schools at which they paid for tuition and textbooks. Four of the students attempted in early January, 1973, to enroll in public schools in neighboring districts in order to complete their education. They were informed, however, that they could not be accepted unless the schools received from the superintendent of the Fairfield schools approval of their enrollment. When they requested such approval, the superintendent refused on the ground that they had been expelled from the Fairfield school system.

Another motion for emergency relief was filed in the district court on February 21, bringing these facts to the court's attention and requesting an order permitting the students to be allowed to continue their public education in some way. A hearing was held on the motion on March 2, 1973, and the motion was denied the same day by the district court (Appendix, pp. 24a-26a). A notice of appeal was filed with regard to that order, and that matter was consolidated with the appeal already pending in the Fifth Circuit.

On April 12, 1974, the Court of Appeals affirmed the decision of the district court, over a dissent from Judge Godbold. All three judges, however, concurred in reject-

[8] The Court also, in an order dated November 27, 1972, ruled on the plaintiffs' motion to correct the administration of the school desegregation plan. It granted relief with regard to monitoring transfers of white students out of certain schools in the district, the correcting of imbalances in the racial makeup of faculty at one school, and the ending of three all-black classes at another, but denied all other relief. This order is not at issue in this proceeding.

ing petitioners' argument that they were entitled to confrontation and cross-examination of the witnesses against them; rather, the school board could rely on written statements by teachers presented to it by the principal of the school.

As of the date of filing this petition, one of the students (Jacques Guest) remains out of school and is without a high school diploma. The other seven were able to finish high school, some at parochial schools, and two by going to live with relatives in Mississippi. At least one student was admitted to college. All eight retain on their records, however, that they were permanently expelled from the schools of Fairfield. Further, the school board is free to continue to impose discipline upon other members of the class pursuant to the procedures upheld by the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

Certiorari Should Be Granted Because the Issue of the Due Process Rights of Public School Pupils in Disciplinary Hearings Is of National Importance and Because the Decision of the Fifth Circuit Conflicts With Those of This Court and Other Federal Courts.

A. *The Question of the Requirements of Due Process in School Disciplinary Proceedings Is of Great National Importance.*

In recent years the lower federal courts have dealt with increasing frequency with questions relating to school discipline procedures. Beginning with *Dixon* v. *Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961), the courts of appeals have attempted to apply, in school cases, deci-

sions of this Court dealing with procedural rights in other areas.[9]

The rapid increase in the amount of litigation is a reflection of the growing awareness and concern for the legal rights of students generally. Stimulated by this Court's decisions in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and *Tinker* v. *Des Moines Independent School Dist.*, 393 U.S. 503 (1969), the area of concern has encompassed issues such as the extent of the rights to free speech, press, and association,[10] the legality of searches and seizures,[11] hair and dress regulations,[12] and corporal punishment.[13] See, *Developments in the Law: Academic Freedom*, 81 HARVARD LAW REVIEW 1045, 1128-1159 (1968); Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970); Wright, *The New Word Is "Pushout"*, 4 Race Relations Reporter 8 (May 1973); Wright *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969).

With regard to student discipline in particular, concern with what has been termed the "pushout" problem has focused on the disproportionate number of black students being subjected to severe punishment, particularly in school systems in the process of desegregating. See, *e.g.*, Bell, *Race and School Suspensions in Dallas*, 62 Integrated Edu-

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[9] See, e.g., *Madera* v. *Board of Ed. of City of New York*, 386 F.2d 778 (2nd Cir. 1967); *Williams* v. *Dade County School Board*, 441 F.2d 299 (5th Cir. 1971); *Betts* v. *Bd. of Ed. of City of Chicago*, 466 F.2d 629 (7th Cir. 1972).

[10] *E.g.*, *Karp* v. *Becken*, 477 F.2d 171 (9th Cir. 1973).

[11] *E.g.*, *People* v. *Overton*, 20 N.Y.2d 360, 283 N.S.Y.2d 22, 229 N.E.2d 596 (1967), *vacated and remanded*, 393 U.S. 85 (1968), *reinstated*, 24 N.Y.2d 523, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

[12] *E.g.*, *Bishop* v. *Colaw*, 450 F.2d 1069 (8th Cir. 1971).

[13] *E.g.*, *Ware* v. *Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd*, 458 F.2d 1360 (5th Cir. 1972).

cation 66 (March-April 1973);[14] Clarke, *Race and Suspensions in New Orleans,* 63 Integrated Education 30 (May-June, 1973); *The Student Pushout, Victim of Continued Resistance to Desegregation* (Southern Regional Council and Robert F. Kennedy Memorial, 1973).[15] Recently, the Department of Health, Education, and Welfare, has begun a comprehensive investigation into this question as a result of the accumulation of evidence indicating a relationship between discipline and desegregation.

To reduce the opportunity for racial discrimination, the procedures used for pupil discipline must be adequate to ensure that proper and non-arbitrary decisions are made. Thus, while much of the discussion of student discipline to date has dealt with procedural questions as such,[16] the relationship between those issues and the substantive bases for imposing discipline should not be overlooked.

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[14] In an opinion as yet unreported, the United States District Court for the Northern District of Texas has found "white institutional racism" in the operation of the school discipline system in Dallas because of the disproportionate number of black students subjected to harsh discipline. *Hawkins* v. *Coleman,* —— F. Supp. —— (Civ. Action No. 3-5774-B, June 5, 1974). Thus in 1973-74, while blacks were 40.9% of the students, they accounted for 59.4% of the suspensions. Moreover, blacks were suspended for significantly longer periods than were whites.

[15] According to *The Student Pushout,* 71% of the pupils expelled or suspended in Dade County, Florida, in 1972 were black; in the Charlotte-Mecklenburg County system, suspensions rose from 1,544 in 1968-69 to 6,652 in 1970-71, and declined to 6,201 in 1971-72. The vast majority of those suspended were blacks. Similarly, while 25 blacks and 11 whites were expelled in 1968-69, 94 blacks and 14 whites were expelled in 1971-72 (*The Student Pushout,* pp. 4-5).

A study prepared by the Office of Civil Rights of the Department of Health, Education, and Welfare, indicates that the expulsion rate nationwide for black students during the 1970-71 school year was three times that of non-minority students (*Id.* at pp. 5-6).

[16] See, *e.g.,* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis,* 117 U. Pa. L. Rev. 373 (1969); Hudgins, *Discipline of Secondary School Students and Procedural Due Process: A Standard,* 7 Wake Forest L. Rev. 32 (1970).

To date, this Court has not addressed itself to the question of the procedural rights of students. It has recognized the importance of the issue, however, by its grant of review in two cases to be argued during the October 1974 Term.[17] Petitioners urge that this case presents, as will be discussed below, additional issues of great importance that are not raised in the other cases before the Court. Therefore, this case is an appropriate one for a grant of certiorari.

B. *Certiorari Should Be Granted to Resolve the Conflict Between Decisions of This Court and the Decision Below.*

It is clear that the school board, in order to decide both whether to impose any discipline and what discipline was appropriate, had to resolve disputed questions of fact. For example, in the case of Cathy Scott and Darlene Phelps it had to determine whether the teacher had or had not given permission to leave, or if the teacher had said something that might have been interpreted as giving permission. Depending on how the facts were resolved, the board might have decided to impose no discipline or a lesser punishment than permanent expulsion. To have decided on the harshest punishment possible, the board must either have concluded that the teacher had not given permission or have decided, on some ground not presented at the hearing, that the two students were leaders of the disruption.

Of course, the only basis for concluding that no permission was given was hearsay in the form of the signed

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[17] *Goss* v. *Lopez*, No. 73-898 (*prob. juris. noted*, Feb. 19, 1974); *Wood* v. *Strickland*, No. 73-1285 (cert. granted, April 15, 1974); See also, *Board of School Commissioners* v. *Jacobs*, No. 73-1347 (*cert. granted*, June 3, 1974).

statement by the teacher.[18] The teacher was not present to be questioned either by counsel for the students or by the school board itself.

The court below rejected petitioners' argument that this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), required "confrontation and cross-examination of witnesses, especially where severe punishments are meted out on disputed facts." 492 F.2d at 701. Although the court found the argument "seductive," it concluded that "it will not do" to apply those protections to school disciplinary proceedings, because such proceedings were "disparate" from parole and welfare revocation hearings and a body of laymen could not be required to apply strict rules of evidence. 492 F.2d at 701-702; Appendix, pp. 5a-7a.

In recent years this Court has handed down a series of decisions that establish procedural rights when a government agency acts to deprive a person of a benefit. In addition to *Morrissey* and *Goldberg*, they include: *In re*

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[18] The entire testimony was as follows:

Mr. Sweeney: What evidence do you have?

Mr. Turner: A signed statement from her teacher saying she left class without her permission.

Mr. Sweeney: Who is the teacher?

Mr. Turner: Mrs. Sexton, first period history.

Mr. Sweeney: What does the statement say?

Mr. Turner: It says that Darlene Phelps left class without permission on Friday, November the 10th, 1972 (A. 288.)

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Mr. Sweeney: Give us the details that support this.

Mr. Turner: Cathy was in the first period class of Mrs. Sexton and left that class without permission of the teacher.

Mr. Newton: Do you have a written statement from Mrs. Sexton to that effect?

Mr. Turner: Yes. (A. 303.)

Gault, 387 U.S. 1 (1967) (juvenile court);[19] *Bell* v. *Burson*, 402 U.S. 535 (1971) (automobile license revocation); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Wolff* v. *McDonnell*, —— U.S. ——, 42 U.S.L. Week 5191 (1974) (prison discipline). This Court has recognized, in the words of *Goldberg*, that, "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. at 269.

Only in *Wolff* v. *McDonnell*, did this Court find an exception to the general rule. *Wolff* makes it clear, however, that the decision is based on the inherent dangers that exist in prison society and on the fact that the deprivation imposed as a result of discipline was not that serious. Thus, the Court would not apply "procedural rules designed for free citizens in an open society." 42 U.S.L. Week at 5197.

The requirement of confrontation and cross-examination, of course, is but one protection against decisions that deprive persons of benefits arbitrarily. If a school board does not, because it cannot, fairly resolve disputed factual issues, and if it can impose severe discipline on the basis of evidence that cannot be challenged because the accuser is absent, then it can and will act arbitrarily.

On the other hand, the basis for the school board's actions in this case might have been either a conclusion that those expelled were leaders, or some unarticulated *ad hoc* determination that they had done something warranting more severe punishment. As Judge Godbold pointed out, in most instances the evidence introduced showed that they

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[19] It is ironic that the petitioners would have been better off, in some respects, in juvenile court both because of the procedures that would have been afforded and because even if they had been adjudicated delinquent they would have been entitled, under Alabama law, to an education. See, Code of Alabama, Title 52, §§ 579 and 598.

had done nothing more than others who were readmitted. Needless to say, such arbitrariness would be a violation of due process and could only be protected against by the imposition of adequate procedural safeguards. Further, by requiring that proper procedures be followed, the federal courts will not be required to act as boards of review of school discipline proceedings. It is one thing, a matter of perhaps considerable burden to the courts, to review myriad disciplinary hearings. It is another to set standards of fairness and due process by which the hearings are to be conducted.

This case, therefore, presents squarely an issue not yet resolved by this Court, whether pupils in public schools are to be afforded the same protections against arbitrary actions as are other "free citizens" or whether they are to be dealt with as if the school were a prison. In light of the general importance of that question as demonstrated above, the petition should be granted to resolve the apparent conflict of the decision below with the decisions of this Court.

C. *Certiorari Should Be Granted to Resolve the Conflict Between the Decision Below and Decisions of Another Circuit and of District Courts in Other Circuits.*

Finally, the Court of Appeals for the Ninth Circuit has held that it was a denial of due process to expel students without a hearing at which they could "cross-examine adverse witnesses." *Black Coalition* v. *Portland School District No. 1,* 484 F.2d 1040, 1045 (9th Cir. 1973). District Courts in two other circuits have made similar rulings. *DeJesus* v. *Penberthy,* 344 F. Supp. 70 (D. Conn. 1972); *Mills* v. *Board of Ed. of District of Columbia,* 348 F. Supp. 866 (D.D.C. 1972). Certiorari should therefore be granted to resolve these conflicts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX

Decision of Fifth Circuit, April 12, 1974

BOYKINS v. FAIRFIELD BOARD OF EDUCATION

GEE, Circuit Judge:

As the Fairfield, Alabama, school case comes before us for the seventh time,[1] the great issues of segregation and integration which were, for our circuit, largely fought out on this very field[2] have departed like the Captains and the Kings, to be replaced by the petulance which this record reveals and the spectre of resegregation by white flight from the school system. As the trial court observed:

> The Court has had many hearings in the Fairfield School Case. When the hearings began there was a white majority in the school system. There is now a black majority and this majority is growing with every term and with every court order. The number of students in the System is dropping every year with the consequent loss of revenue. The cooperation between the races apparently has disappeared. Picayunish claims are being made on the one hand and vigorously contested on the other. If this System is to survive this continued litigation must come to an end. Many of the black students appear to have overlooked the point that the object of attending Fairfield High is to obtain an education and not merely to maintain a point of which an issue may be made.

Appellants are Negro school children who are members of the class who brought this suit originally. They complain of the process by which nine Negro students were punished for misconduct, of the severity of the punishment which some received, and of the refusal of the district court to order the school authorities to grant various demands which the Negro

1. United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385; Boykins v. Fairfield Bd. of Ed., 399 F.2d 11 (5th Cir. 1968); Boykins v. Fairfield Bd. of Ed., 421 F.2d 1330 (5th Cir. 1970); Boykins v. Fairfield Bd. of Ed., 429 F.2d 1234 (5th Cir. 1970); Boykins v. Fairfield Bd. of Ed., 446 F.2d 973 (5th Cir. 1971); Boykins v. Fairfield Bd. of Ed., 457 F.2d 1091 (5th Cir. 1972).

2. See the landmark panel and en banc opinions at 372 F.2d 836 (1966) and 380 F.2d 385 (1967).

students had sought to enforce by the boycott which led indirectly to their expulsion. We affirm.

Following the most recent remand of this case to the district court, a final plan for the desegregation of the Fairfield schools was put into effect. When school next commenced, however, Negro students conducted a boycott of the school, seeking to enforce demands such as that the School Board:

1. Prohibit the practice of requiring spring pre-registration of classes although, as the court below found, all students, Negro and white, were required to pre-register and no discrimination was shown.

2. Prohibit school authorities from allowing white students to leave campus for lunch since it was generally more convenient for them to go home for lunch than for Negro students.

3. Prohibit the school from serving inferior food to Negro students, although all students eat in the same two cafeterias.

4. Increase the time for lunch, and the time between classes.

5. Order that more Negro students become cheerleaders and members of the band, even though the present selection process was found by the district court to involve no racial discrimination.

6. Order more Negro students to become members of the Pep Club even though membership is open to all students.

7. Require a Negro History Week, and a Black Studies curriculum.

8. Require "sock hops" and school proms.

9. Change the school disciplinary policy which makes it a school offense to be late for class an excessive number of times.

10. Require the school to open the school doors before 7:30 each morning.

11. Order teachers at the Fairfield School System to refrain from using profanity.

12. Allow Negro students to attend dancing class without paying the fee required of other students.

13. Require the school officials to distribute textbooks which are in better condition.

This boycott, commenced in late October and carried over into early November, resulted in the suspension of over 100 students, all but three of them Negro, from school. A series of motions by counsel for plaintiffs followed, seeking enforcement of such demands as the above and reinstatement of the suspended students. On November 9, 1972, the court below entered its order requiring the readmission of the suspended students and setting a hearing on the motion seeking review of the demands upon which the boycott had been based. The ordered readmission was contingent upon termination of the boycott, return to class by all students, and an end of disruptive activities.

Most students returned to class the next day. Almost immediately, however, the same sort of difficulties which had plagued the school term recommenced. Clarence Young, one of the students who was later expelled, intervened in a trivial incident and undertook to instruct a Negro faculty member as to the proprieties of his behavior. An altercation between them followed. Young berated the instructor, using such epithets as "Uncle Tom" and "half whitey." He was taken to the principal's office, and word of the incident immediately spread through the school. Various students, including the other expellees, left class without permission. Some, urging others to join them, went from classroom to classroom calling for students to leave classes to participate in a meeting to discuss what should be done to rescue Clarence Young. Many students left class, the police were called, and attempts were made to persuade the students to return to class without much

success. School was therefore closed in the middle of the morning and all students sent home.

Twenty-one students were subsequently sent notices of suspension from school for their participation in the disruptions of November 10 and were also informed that individual hearings would later be held by the Board of Education to decide whether they should be reinstated. These hearings were held on November 25, 1972. As a result of the hearings, four of the students were immediately readmitted, eight were readmitted after a week's further suspension, one was suspended for the remainder of the semester, and eight were expelled. The record indicates that, as a result of the expulsion, difficulty was later encountered by the expelled students in obtaining entrance to other public schools. As of a hearing held by the district court in March of 1973, none of these students had reapplied to the Fairfield School Board, so that what the consequences of such a reapplication would have been are unknown. However, at oral argument the court was advised by counsel for plaintiffs that all but one of these students were attending school somewhere as of that time.

The procedures which were followed in the hearing, and of which complaint is here made, were outlined by counsel for the Board as follows:

> Let me ask you if this procedure will be agreeable. We will call each student from outside into the conference room with his parent or guardian. We will explain to the child what he has been charged with, and ask him if it is clear in his mind what school rules he has violated. If he has no questions, we will then present the evidence against the child to support the accusations. Having done that, we will ask the student if he has anything to say to contradict the charges that have been made against him, or the evidence to support charges that have been made against him. After that we will—I think the Board should ask the School Administrator that is presenting the evidence any—and the child—any questions that you think are relevant in order to

resolve any conflict. We're going to accord Mr. Newton the privilege of cross-examination. It is not a right that he can insist on, but we are showing him that courtesy. After the Board, after the school and the child have presented whatever evidence they want, then we will excuse the child and go on to the next student. Is that an agreeable process?

Each student was represented by the same counsel, Mr. Demetrius C. Newton, and the only objection to the suggested procedure voiced by him was a desire on his part to himself determine and declare whether the student understood the charge against him rather than have the student make and state his determination of that matter.[3] The suggested procedures were uniformly followed in conducting the Board's hearings.

[1] Appellants principally complain that much of the evidence upon which the expulsions were based consisted of what was technically hearsay. This is undoubtedly correct. The main witness against the students was the school principal, Mr. Hershell Turner, who had investigated the charges against the students and who presented the results of his investigation of each incident to the School Board. In some instances Turner had first-hand knowledge, and in others his testimony was based on attendance records and other reports which could likely have been qualified under exceptions to the hearsay rule; but in main it consisted of reading or reciting statements made by teachers in response to his inquiries.

As to this contention, appellants correctly concede that the present rule of this circuit in school discipline cases affords them no comfort. "[T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies." Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961). They contend, however, that we should read the Supreme

3. In the event, the charges were of such a simple nature, e. g., reviling the teacher before the class, or leaving class after having been told not to do so, that no problem was presented.

Court's *Goldberg*[4] and *Morrissey*[5] decisions as expanding the requirements of *Dixon* to add to them universal confrontation and cross-examination of witnesses, especially where severe punishments are meted out on disputed facts. We decline to do so.

There is a seductive quality to the argument—advanced here to justify the importation of technical rules of evidence into administrative hearings conducted by laymen—that, since a free public education is a thing of great value, comparable to that of welfare sustenance or the curtailed liberty of a parolee, the safeguards applicable to these should apply to it. At argument appellants' counsel, in response to questions, opined that a right to appointed counsel was probably also existent. In this view we stand but a step away from the application of the *strictissimi juris* due process requirements of criminal trials to high school disciplinary processes. And if to high school, why not to elementary school? It will not do.

[2] The requirements of due process are sufficiently flexible to accommodate themselves to various persons, interests and tribunals without reduction to a stereotype and hence to absurdity.[6] As Mr. Justice Stewart, writing for the Court, stated in Cafeteria Workers v. McElroy, 367 U.S. 886, at 895, 81 S.Ct. 1743, at 1748, 6 L.Ed.2d 1230 (1961):

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [citations omitted] " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is

4. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

5. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

6. "[T]he standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970).

"compounded of history, reason, the past course of decisions . . . ." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162–163, 71 S.Ct. 624, 643, 95 L.Ed. 817, 848, 849 (concurring opinion).

Basic fairness and integrity of the fact-finding process are the guiding stars. Important as they are, the rights at stake in a school disciplinary hearing may be fairly determined upon the "hearsay" evidence of school administrators charged with the duty of investigating the incidents. We decline to place upon a board of laymen the duty of observing and applying the common-law rules of evidence.

Indeed it is plain that *Morrissey* does not go so far as appellants would have us take the Fairfield Board of Education. The right of confrontation and cross-examination there discerned in the parolee is not absolute but may be denied for good cause, and the receipt of evidence which would be barred by the hearsay rule is specifically suggested. *Morrissey, supra* 408 U.S. note 5, at 489. It well may be that all *Morrissey* contemplates on this head is precisely what appellants were accorded: a right to confront and cross-examine such adverse witnesses *as appear,* without the technical strictures upon their testimony of the hearsay rule. But whether or no, we reject the attempted analogy of student discipline to parole revocation or the termination of welfare benefits. Cf. Student Discipline, 45 F.R.D. 133, at 142. The situations treated are simply too disparate to permit an uncritical transfer of specific due process requirements from one to the other.

[3, 4] Complaint is also made of the severity of the punishment imposed on those who were expelled. The punishment was severe, but we cannot say that it was so severe as to have been arbitrary or clearly unreasonable. It is agreed on all hands that school officials exercise a comprehensive authority, within constitutional bounds, to maintain good order and discipline on school grounds. *E. g.,* Tinker v. Des Moines Community School Dist., 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Bright v. Nunn, 448 F.2d 245, 249 (6th Cir.

1971). And in Ferguson v. Thomas, *supra* note 6, 430 F.2d at 859, we noted that the findings of school agencies " . . . when reached by correct procedures and supported by substantial evidence, are entitled to great weight. . . . "

The Fairfield School Board was presented with a situation of recurring disorder which bid well to disrupt finally a school year already crippled. Firm action was called for and was taken, but no indiscriminate or mass discipline was imposed. The punishment meted out was such as has traditionally been imposed by school authorities in severe cases. The district court has reviewed the evidence supporting the Board's action in each instance, as have we, and has concluded that it is substantial. We have held that due process was accorded, and we cannot say that the findings of the court below were erroneous.

[5] Finally, appellants complain of the refusal of the district court, in the name of integration, to require the Board to accede to such demands as are quoted above. Whatever merit these propositions may have as suggestions to the School Board, on the record they are not for our cognizance. The court did not err in finding from the evidence presented that each of them was either insubstantial or involved no racial discrimination. It appears that Fairfield's dual school system is drawing to a close and with it, we may hope, this long case.

Affirmed.

GODBOLD, Circuit Judge (dissenting in part):

I must record a partial dissent, to that part of the decision which affirms the expulsion of eight black students.

The power to expel students is not unlimited and cannot be arbitrarily exercised. Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (C.A.5, 1961).

> Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded . . . that that power is not unlimited and cannot be arbitrarily exer-

cised. Admittedly, there must be some reasonable and constitutional grounds for expulsion or the courts would have a duty to require reinstatement.

Only recently we said that there can be such shocking disparity between an offense by a pupil and the disciplinary penalty imposed upon him by school authorities that the commands of the Fourteenth Amendment have not been met. Lee v. Macon County Board of Education (Randolph County), 490 F.2d 458 [C.A.5, 1974]. Accepting the foregoing principle, the majority hold, though without discussion of the underlying facts, that the expulsions of eight pupils were not so severe as to have been arbitrary or clearly unreasonable.

1. The facts.

The background is as stated in the majority opinion. Operation of the Fairfield school system has been a fruitful source of litigation. The Board is now before us for at least the seventh time.[1] This is not to say that the Board cannot be right and blacks cannot be wrong, but that the Board's track record in desegregating the system must be considered as part of the overall circumstances of the present case. More than 100 students were suspended from the Fairfield High School

1. United States v. Jefferson County Bd. of Ed., 372 F.2d 836 (C.A.5, 1966), aff'd en banc, 380 F.2d 385 (1967) [reversing decision in favor of Board, ordering desegregation of schools and permitting freedom of choice]; Boykins v. Fairfield Bd. of Ed., 399 F.2d 11 (C.A.5, 1968) [reversing Board's denial of freedom-of-choice applications of blacks to transfer to formerly all-white schools]; Boykins v. Fairfield Bd. of Ed., 421 F.2d 1330 (C.A.5, 1970) [reversing because freedom-of-choice not operating acceptably and school attendance zones drawn by Board in a manner reducing rather than furthering desegregation]; Boykins v. Fairfield Bd. of Ed., 429 F.2d 1234 (C.A.5, 1970) [remanding because desegregation plan of Board did not change status of integration in elementary schools and did not explore possible alternatives as to junior and senior high schools]; Boykins v. Fairfield Bd. of Ed., 446 F.2d 973 (C.A.5, 1971) [remanding for reconsideration in the light of new Supreme Court decision]; Boykins v. Fairfield Bd. of Ed., 457 F.2d 1091 (C.A.5, 1972) [reversing and remanding for failure to desegregate an all-black school and for additional hearing on issue of whether black high school students were being purposefully segregated by being placed in classes held in a separate building].

because of repeated absences during a black boycott. On November 9, 1972, those suspended were ordered by the District Court to be readmitted, contingent upon termination of the boycott, return of all students to classes, and an end to disruptive activities. Readmissions began on the morning of November 10. The Board takes the position, and the District Court agreed, that the eight pupils were expelled for what they did that day. Let us see what it was.

Clarence Young: Events involving him triggered the difficulties of November 10. The charge against him was:

> He was disrespectful for authority and carrying on in the hall as in the sense of inciting something among the students.

The testimony against him came from Coach Evans, a Negro, plus a brief statement by Principal Turner. From the testimony the Board could conclude that the following events occurred. It was necessary for suspended students to get passes from the guidance office to return to classes. On the morning of November 10 students began walking into the building where the guidance office was located. Young

> seemed to be directing other students to come in the building because he stopped at the front door at the main entrance up there mouthing off at the other students, and getting, like he was getting everything together for them to march in the room.

Coach Evans opened a door and the door struck a male and then a female student in the line of students waiting to get passes. Evans apologized to them. Either before he apologized, or while he was doing so, or immediately after he had done so—the facts are unclear—Young told him he owed an apology to the female.[2] Immediately thereafter other students began talking with Young. Evans considered that Young

2. This is the incident that the majority opinion describes as Young's "under[taking] to instruct a Negro faculty member as to the proprieties of his behavior."

"was trying to bring the crowd on," that Young was "for the wrong thing." Coach Evans felt "in my expectation, he didn't come there to go to school that day. That is my expectation. I could be wrong." Evans secured a pass for Young and gave it to him so that he would go on to class. As Young walked away he referred to Evans as "Uncle Tom" and "Half Whitey". As Young crossed an open area en route to his class he was seen to be "carrying on." A city councilman present saw him and told Evans he should have a talk with Young because "it looks like he is for the wrong thing."

Coach Evans engaged Young in conversation, and Young took the position he had done no wrong and was being "picked on." Possibly he repeated the racial epithets he had earlier used. Evans took him to the principal's office and talked with him. Young was excited and talked sufficiently loudly that a staff member suggested that the principal also go into the office, and Principal Turner went in and stayed briefly. A friend of Young's called his mother, she came to the office, and in the ensuing conversation she twice told her son to "simmer down."

Evans testified that he did not consider Young to be a leader of the other students. He did, however, hear Young telling other students to get their passes. Evans disapproved of this, though his reason is unclear, since without dispute the necessity for passes was being communicated by word of mouth.

As Judge Gee's opinion points out, word spread about the difficulty with Young, some black students left their classes, and some went to other rooms and called for other students to leave classes and join in a meeting to discuss what should be done about the incident. A group gathered outside the principal's office where conversations with Young were, or had been, going on. That brings us to the facts concerning the other expellees.

Jacque Guest: The charge was that he left class without permission and encouraged other students either not to go to class or to walk out of classes. He admitted the offense, including going to another classroom and encouraging students to leave.

Beverly Claiborne: The charge against her was twofold: first, that she obtained a pass but did not go to her first period class; second, that subsequently Principal Turner told her she was expelled and began to explain something to her [apparently her right to a hearing], whereupon she got up and left his office and in an outer office, in the presence of members of his staff and other students, used profanity concerning him.[3] Miss Claiborne admitted saying the words but claimed she had said them to herself and not "out loud."

Linda Meadows: The charge was that she came to a classroom other than that to which she was assigned, the teacher told her to leave, and she cursed him in the presence of the class and left. The Board was entitled to accept the written statement of the teacher that this occurred. It could accept Miss Meadows' testimony that her purpose in going to the classroom was to see if other students who had participated in the walkout were in the room. There is, however, no evidence that she or anyone with her urged students in the classroom to leave class or indeed said anything to them. On cross examination of Miss Meadows the Board attorney questioned her concerning whether she went to classrooms other than to one to which she admitted going, and she denied doing so, and there is no evidence that in fact she did.

Darlene Phelps and Cathy Scott: The charge was leaving their first period classroom without permission. The Board could accept their teacher's statement that they did so. Miss Phelps acknowledged going to another classroom, stating that she went to a study hall and complained to the teacher about

3. The verbiage is unrevealed because at the Board hearing it was not verbalized but written on a piece of paper that was handed around and discussed.

what was occurring [presumably the events of the morning]. That teacher neither testified nor gave a statement, and there is no evidence that Miss Phelps attempted to get students to leave the study hall, or indeed that she said anything to the students, or that her conduct was disruptive. Faculty member Bird testified that in the presence of Cathy Scott he told a group of students to return to their classes.

John Hall and Beverly Law: They were present for the hearing before the Board but, after several hours, left before their cases were reached. The Board heard their cases in their absence. The evidence against them, which the Board could accept, was the written statement of their teacher that they left class without permission after being told repeatedly to remain.

2. The District Court order.

In reviewing the Board action, the District Court recognized, citing *Dixon*, that part of its function was to determine "whether there was evidence of some reasonable or constitutional ground for the action taken in imposing the sentence of expulsion." In rejecting plaintiffs' contention that the expellees were punished because they had been leaders in the boycott *before* November 10, the court said:

> The evidence does not show that these students were disciplined for being leaders in the boycott prior to November 10, 1972, *but the fact that they became leaders in the continuation of the demonstration on November 10, 1972, was a matter certainly material for the consideration of the school authorities* in view of the Court's order of November 9, 1972, and the school authorities' attempt to prevent further demonstrations and disturbances when school reconvened on November 10, 1972. (Emphasis added.)

The facts, as set out above, reveal that the District Judge's premise that the eight expellees were "leaders in the continuation of the demonstration on November 10" was wrong, at least with respect to Phelps, Scott, Hall and Law. Phelps'

offense was to leave her class, go to another classroom and register a complaint with the teacher. Scott left her class and later was where she could have heard a teacher tell students to return to class. Hall and Law left their class after being told not to. Turning to the other four, the Board could accept that part of Evans' testimony tending to describe the actions of Young as a leader.[4] Guest's actions were those of a leader. Claiborne and Meadows cannot accurately be described as leaders.

The situation on November 10 was volatile. School officials were attempting to defuse it and get on with the primary job of educating young people. It was important that students go to and remain in their classrooms. Conduct that in a different atmosphere might have called for less severe punishment could, under these particular circumstances, justify more severe penalties. Cf. Dunn v. Tyler Independent School District, 460 F.2d 137 (C.A.5, 1972). In my view the expulsions of Young and Guest were within constitutional bounds. I am much less certain as to Claiborne and Meadows—I have the feeling that in the calm light of another day the District Court might not have sustained their expulsions but for the fact he erroneously thought they were leaders in re-igniting disorder. I am not uncertain as to Phelps, Scott, Hall and Law. What they did, and all that they did, was to leave their classrooms without authority just as did numerous others on the same occasion. With respect to these four, there is no evidence that any one of them urged any other student to leave class or disturbed any classroom, participated in any disorder (other than leaving class) or committed any act of leadership. A sentence of lifetime exile from the public school system of the place where they reside cannot stand under these circumstances.

> [A] sentence of banishment from the local educational system is, insofar as the institution has power to act, the

4. Also Young's expulsion was independently sustainable on the basis of his use of expithets directed at Coach Evans.

extreme penalty, the ultimate punishment. In our increasingly technological society getting at least a high school education is almost necessary for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship, unless the child has the financial ability to migrate to another school system or enter private school.

Private citizens, law making bodies, and the media all bend their efforts toward encouraging children to complete their high school educations and to avoid becoming dropouts and burdens to society. In the twenty years since Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), this country has committed itself to a policy against state-imposed public school segregation. It is not lesser but more stringent state action to bar a child forever from public school, with the result that he secures no education at all.

Lee v. Macon County Board of Education, *supra*, 490 F.2d p. 460.

The plaintiffs urge that they were singled out for expulsion for reasons other than what they did on November 10. There is good circumstantial evidence supporting that claim. After their expulsion at least four of them attempted to enroll in other public high schools in adjacent geographical areas, and were informed that each would have to secure an "OK" from the Fairfield superintendent to do so. They approached him, asked his approval, and it was refused. The superintendent testified that all transcripts and other required records were furnished but that affirmative statements in the form of any "OK" or "recommendation" were denied. Obviously the superintendent had no legal duty to assist these young people to get into schools elsewhere. But I confess my inability to understand the unwillingness to lift a finger—even to the extent of a statement saying "we expelled them for good reasons, but if you want to accept them we do not object." Sentence of exile was coupled with a specific refusal to act,

with the consequence that the effective scope of exile was broadened to include adjoining geographical areas as well. The Board's argument that it does not control the admission policies of other schools is a subterfuge. No one contends that it does. The Superintendent's refusal cut off at the threshold the possibility that other systems, pursuant to their own admission policies, might have been willing to accept the students.

Secondly, there was obvious disparity in penalties. Numerous students left their classes without permission. A number of those charged for doing so were not expelled, including one who left ostensibly to go home but remained on the school grounds knowing that he was not supposed to do so; another who left and went home; a third who left class in response to students coming to his classroom and telling him about Clarence Young.

Thirdly, the Board declined to receive evidence of prior conduct, good or bad, by the charged students. It announced that it was limiting itself to consideration of events of November 10. This, of course, makes the disparity in punishments more suspect. It leaves no explanation, or even attempt at explanation, for the wide disparities. The Board's response is that it is entitled to impose differing penalties. Indeed it has that authority but the presence of power is not an explanation for the manner of exercise. Additionally, this limitation of evidence by the Board accentuates more sharply the erroneous premise by the District Judge that all expellees were leaders on November 10.

With apparent determination to drive every nail into the coffin, the majority make the point that none of the students reapplied for admission, so that what the consequences of reapplication would have been are unknown. This was hardly a promising request to be made to a system that would not even "OK" an attempt to apply for admission to another system, but pretermitting that point, there is no such requirement as a condition precedent to judicial consideration or

ial relief, nor does failure to reapply diminish the finality e Board's decision of permanent expulsion. Also, while it t a matter of formal record, the court inquired at oral ment about the ultimate fate of the expellees. We were that some were admitted to parochial schools where on is required, at least two are attending schools in ner state, and one is known to be out of school. The ield system records on each of the eight students contin- reflect that he or she was permanently thrown out of ystem and imply that each was guilty of conduct justify- hat penalty. This impediment to college admission and ublic and private employment is now made immutable. the statement by the majority that all but one of the were able to find schooling elsewhere is mere legal ing syrup neither mitigating the wrong nor mooting the

Decision of District Court, December 14, 1972

Opinion in Lieu of Formal Findings

By this Court's opinion of November 27, 1972, the plaintiffs' motion seeking relief from explusion or suspension of certain students was continued pending administrative hearing. The Fairfield Board of Education held the administrative hearings on November 25, 1972. It is not questioned that the students involved had advanced written notice of the charges against them and that upon the hearing each one was advised of the charges and later of the action taken by the Board. Twenty-one students were involved. The following students were readmitted as of November 27, 1972: Marsha Gulley, Randy Lawrence, Linda Watts and Anthony Williams. The following students were readmitted as of December 4, 1972: Cleophus Carter, David Coleman, Roland Lawrence, Richard McCurtis, Eddie McKenzie, Roger McLin, Falenza Pickens and Beverly Williams. Vanessa Arrington was suspended for the remainder of the semester. The following students were expelled: Beverly Claiborne, Linda Meadows, Clarence Young, Jacques Guest, Darlene Phelps, Cathy Scott, John Hall and Beverly Law.

The motion as it now stands challenges the suspension of Vanessa Arrington for the remainder of the semester and the expulsion of the eight students above named.

As found by the order of November 9, 1972, some 114 students who were involved in the boycott were dropped from the roll because of absences of 20 or more days, in violation of Board of Education Rule 20. The Court directed the readmittance of these students, including those later involved in the expulsion and suspension action. The Court was assured by the counsel for the plaintiffs that if these students were readmitted, plaintiffs and their

counsel would exercise every reasonable effort to terminate the boycott by November 10, 1972, inasfar as the students themselves at Fairfield High School were concerned. In the order of November 9, 1972, the Court stated that:

> "The Court does not look with favor upon any action that contravenes the principle that he who seeks equity must offer to do equity. Consequently, the relief afforded the movants is conditioned upon the abandonment of the boycott by all of the students in the Fairfield system simultaneously with re-admission of the students who are involved under the motion."

Under the Court's order the re-admission was to take effect on November 10, 1972. The tumult that had existed during the boycott was continued on the tenth. Police officers had to be called in to police the school.

After Beverly Claiborne had obtained her readmittance slip from the counselor's office she did not report to her first period class with Mr. Craig, and on Monday when she was informed that she had been expelled she used vile and profane language in Mr. Turner's (principal) presence. She denied using the language but on cross-examination she admitted that she made the statements "To myself. I didn't say it out loud, to myself I did, but not out loud." She also contended that she had been excused. The evidence sustained the charges against her.

Linda Meadows went to a room to which she was not assigned and when instructed to leave cursed the teacher in front of the class and then left. She denied using the profane language. She admitted looking into the various rooms to ascertain who was in the demonstration or if anyone who was in the demonstration was in the classrooms. The evidence sustained the charges.

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Clarence Young was charged with being disrespectful to Mr. Evans, a black teacher, and inciting the demonstrators and directing the students who were in the demonstration on the morning of November 10, 1972. He called Mr. Evans an "Uncle Tom" and "half whitey." Young denied making these statements to Mr. Evans. The evidence sustained the charges.

Jacques Guest was charged with walking out of his class without permission on the morning of Friday, November 10, 1972, and encouraging other students either to not go to class or to walk out of their classes. The evidence substantiates these charges. Guest admitted walking out of the class before the period was over without the permission of the teacher.

Darlene Phelps was charged with leaving her first period class on November 10, 1972, without the permission of Mrs. Sexton, her teacher. She testified that she had the teacher's okay. The evidence sustained the charge.

Cathy Scott was also charged with leaving her class on the morning of November 10, 1972, without permission. She testified that she had Mrs. Sexton's permission to leave. There was evidence to sustain the action of the Board in expelling this student.

John Hall walked out of his class without permission on the morning of November 10, 1972, after being repeatedly told to stay in the class; so did Beverly Law. Neither John Hall nor Beverly Law appeared for the hearing. There was sufficient evidence to sustain the action of the Board.

Decision of District Court, December 14, 1972

Vanessa Arrington left her class during the first period on the morning of November 10, 1972, without the permission of her teacher. She testified that when everybody else had walked out of Mrs. Robinson's room she asked permission to leave and permission was granted. She conceded that to leave the room she had to have a written slip evidencing permission, even to go to the restroom. She further testified that she asked for one of the slips but was not given it. There was evidence to sustain the suspension.

In a hearing of this nature the Court does not understand that it has the function of retrying the issues of expulsion or suspension *de novo*. Nor is it the Court's duty to pass upon the credibility of witnesses. It appears that its function is to determine: (1) whether there has been procedural due process, and (2) whether there was evidence of some reasonable or constitutional ground for the action taken in imposing the sentence of expulsion or suspension. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150.[1]

In view of what had occurred at the school prior to November 10, 1972, it was essential that the students go to their classes and remain in their classes rather than milling around in the halls and continuing the demonstration. It is not logical nor does it make sense that the teachers would excuse the students from the classes as several of them have testified. The demonstrations attending the boycott could hardly be prevented if the students were excused from their classes or if they walked out deliberately as the evidence indicates these students did.

[1] "[A] full-dress judicial hearing, with the right to cross-examine witnesses, is [not] required."—*Id.*

Decision of District Court, December 14, 1972

This Court's order of November 9, 1972, giving these students the right to return to their classes was conditioned upon their abandonment of the boycott. Not only did the action which the evidence shows that they took contravene the instructions of the school authorities, but it flew in the face of this Court's order of November 9, 1972. In view of those demonstrations the school authorities felt it necessary to excuse school on November the tenth and this was done and another day was lost. The maintenance of discipline was a matter of first concern if classes were to continue. The students who were disciplined by expulsion or suspension flaunted the fundamental principles of discipline which obviously were inherent in the situation existing on the morning of November 10, 1972, namely, that they should go to and remain in their classes and not become involved in further demonstrations.

Counsel for the plaintiffs contends that the students are being punished because of their leadership in the boycott, a boycott which had cost the School Board some $30,000.00 in state funds. The evidence does not show that these students were disciplined for being leaders in the boycott prior to November 10, 1972, but the fact that they became leaders in the continuation of the demonstration on November 10, 1972, was a matter certainly material for the consideration of the school authorities in view of the Court's order of November 9, 1972, and the school authorities' attempt to prevent further demonstrations and disturbances when school reconvened on November 10, 1972. Counsel complains that others who were equally guilty were not punished by expulsion or suspension. This fact, if it be a fact, could hardly be justification for lifting

the sentences with respect to these students. The hearing that was held by the Board was an extensive one and there was much evidence. The Court does not feel that it is called on to analyze all of the evidence. It simply states that within the ambit of its prerogative respecting the review that the students now complaining were afforded procedural due process and the expulsions and the suspension were merited under the evidence.

An order will be entered pursuant to the foregoing findings.

Done this the 14th day of December, 1972.

H. H. GROOMS
United States District Judge

Order and Oral Opinion of District Court, March 2, 1973

Order

This matter came on for hearing on March 2, 1973, upon the plaintiffs' motion for emergency relief filed herein on February 21, 1973. After hearing the parties and upon due consideration thereof, the Court is of the opinion that said motion is due to be overruled.

It is, therefore, ORDERED, ADJUDGED and DECREED that the plaintiffs' said motion be and the same hereby is overruled.

Done and Ordered, this the 2nd day of March, 1973.

H. H. GROOMS
United States District Judge

Order and Oral Opinion of District Court, March 2, 1973

ORAL OPINION

The Court: Gentlemen, this matter, I think, probably vests itself to the school Board, to the school authorities. In the absence of some evidence that there has been some change in conditions, I would not be justified in vacating this order that was previously entered. Now maybe the School Board of the School officials will relent, that depends a lot on the conduct, maybe, of the students or their willingness to—well, to ask for forgiveness and so on, but that is a matter that should be addressed to the School Board, and they haven't re-applied to the School Board for re-admission out there, and that is where they should start in this matter.

I am not inviting trouble for the School Board, but I don't think that it's a matter for this Court, and it's a matter for the Board, and if there is new evidence brought out that there should be a changed condition or the Court should modify the order then I can proceed with the matter at that time, but at this juncture I would just be acting without any reason or evidence, Mr. Newton, to vacate this order.

Mr. Newton: If it please the Court, your order sort of foreclosed any attempt that the students have, you heard the testimony from the Superintendent.

The Court: The School Board has the authority to modify this order, I didn't expell the students, they expelled the students.

Mr. Newton: You upheld it.

The Court: I didn't direct that, what the School Board should do permanently, that is up to them, if they want to modify that or if they want to reconsider their order, of course, they have the right to do so.

Mr. Newton: Exactly.

The Court: And I think any attempts to that end should be addressed to the School Board.

Mr. Newton: If it please the Court, once Your Honor—the School Board's language was permanent expulsion, an expulsion which this Court upheld, and we say—

The Court: Well, permanent is like my wife's permanent wave, she gets a permanent wave and I say, "Well, I can't understand why this wave isn't permanent, you are getting another one now".

Mr. Newton: Well, Your Honor, in the light of the testimony we just heard means permanent here, unlike the permanent wave, it seems to me to mean very permanent, the Superintendent says, "No, because you are expelled".

The Court: Maybe they have got a bigger spot in their hearts than you think, Mr. Newton.

Mr. Newton: In the meantime, while we have—we have students who are not entitled to a free public education.

The Court: That is the consequences of expulsion, and I will overrule the motion.

Mr. Newton: Thank you very much.

End of Proceedings

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-....

GEORGE ROBERT BOYKINS, et al.,
Petitioners-Plaintiffs,

v.

FAIRFIELD BOARD OF EDUCATION, et al.,
Respondents-Defendants.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Appellees in the above entitled case move to dismiss and affirm Case No. 74—on the ground that the appeal raises only questions of fact that were correctly resolved by the courts below.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I

Whether the findings of the courts below that substantial evidence supported the disciplinary action taken by the Fairfield Board of Education was clearly erroneous?

II

Whether the procedures followed in the disciplinary hearing of November 25, 1972, complied with the requirements of the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

"The essential thrust of Petitioners' brief is to raise factual questions through the guise of procedural technicalities. In raising each issue presented on appeal, Petitioners argue that even though the District Court made no clearly erroneous findings of fact, or improperly applied any governing law applicable to the field of education, still there must be reversible error. The arguments presented are frivolous and irrelevant to the subject matter at hand. A review of the procedures followed by the Fairfield Board of Education as outlined in the Opinion of the Courts below (see Appendix A of Petitioners' brief) shows that the Fairfield Board conscientiously endeavored to follow procedural guidelines established by the Federal Courts, and did thereby comply in full with every requirement of the Due Process Clause of the Fourteenth Amendment."

Respondent Fairfield Board of Education (Fairfield) will not take detailed exception with Petitioners' Statement of the Case or Statement of the Facts, since most of the matters discussed therein are not relevant to the specific findings or the specific issues now before the Court. Instead, Respondent respectfully urges this Court's attention to the detailed recitation of the evidence of record in Judge Groom's opinion of November 27, 1972 and December 14, 1972. After treating the issues relating to curriculum and administrative responsibilities raised by Petitioners, Judge Groom concluded at page 14 as follows:

> "The Court has had many hearings in the Fairfield school case. When the hearings began there was a white ma-

jority in the school system. There is now a black majority and this majority is growing with every term and with ever Court order. The number of students in the system is dropping every year with the consequent loss of revenue. The cooperation between the races apparently has disappeared. *Picayunish claims are being made on the one hand and vigorously contested on the other.* If this system is to survive this continued litigation must come to an end. *Many of the black students appear to have overlooked the point that the object of attending Fairfield High is to obtain an education and not merely to maintain a point of which an issue may be made. Throughout the hearing, the lack of discipline on the part of black students has been evident. This litigation has been enough to 'tax the patience of a Job'. This Court has tried to demonstrate its patience, which has not yet been exhausted but it frankly is somewhat frayed."* (Emphasis supplied.)

Similarly, after reviewing the record of the disciplinary hearing which led to the suspension and expulsion of several students, Judge Grooms, in his opinion of December 14, 1972, reached the following conclusion at page 4:

"In view of what had occurred at the school prior to November 10, 1972, it was essential that students go to their classes and remain in their classes rather than milling around in the halls and continuing the demonstration. It is not logical nor does it make sense that the teachers would excuse the students from the classes as several of them have testified. The demonstrations attending the boycott could hardly be prevented if the students were excused from their classes or if they walked out deliberately as the evidence indicates these students did.

This Court's order of November 9, 1972, giving these students the right to return to their classes was conditioned upon their abandonment of the boycott. Not only did the

action which the evidence shows that they took contravene the instructions of the school authorities, *but it flew in the face of this Court's order of November 9, 1972.* In view of those demonstrations the school authorities felt it necessary to excuse school on November 10 and this was done and another day was lost. The maintenance of discipline was a matter of first concern if classes were to continue. The students who were disciplined by this expulsion or suspension flaunted the fundamental principles of discipline which obviously were inherent in the situation existing on the morning of November 10, 1972, namely, that they should go to and remain in their classes and not become involved in further demonstrations." . . .

. . . The hearing that was held by the Board was an extensive one and there was much evidence. The Court does not feel that it was called on to analyze all of the evidence. It simply states that within the ambit of its prerogative respecting the review that the students now complaining were afforded procedural due process and the expulsion and suspension were merited under the evidence."

ARGUMENT

I

Where Substantial Evidence Supported Disciplinary Action Taken by a Duly Constituted Bi-Racial School Board, the District Court Was Not "Clearly Erroneous" in Accepting Their Findings of Fact.

In *Ferguson v. Thomas*, 430 F. 2d 852 (5th Cir. 1970), this Court at page 859 held that fact findings by academic agencies "when reached by correct procedures and supported by substantial evidence, are entitled to great weight, and the Court should never lightly substitute its judgment for that of the Board." See also *Duke v. North Texas State University*, 469 F. 2d 829, 838 (5th Cir. 1973); *Russo v. Central School District No. 1, Town of Rush, N. Y.*, 469 F. 2d 623, 628 (2nd Cir. 1972); *Linwood v. Board of Education, City of Peoria, School District No. 150, Illinois*, 463 F. 2d 763, 770 (7th Cir. 1972); *Sill v. Pennsylvania State University*, 462 F. 2d 463, 469 (3rd Cir. 1972).

In his opinion of December 14, 1972, Judge Grooms reviewed the evidence concerning (1) Vanessa Arrington, (2) Beverly Claiborne, (3) Linda Meadows, (4) Clarence Young, (5) Jacques Guest, (6) Darlene Phelps, (7) Kathy Scott, (8) John Hall and (9) Beverly Law; and based on that review of the record concluded at page 4 that substantial evidence supported the administrative action taken.

Petitioners dispute the conclusion reached by Judge Grooms, not on the grounds that his decision was "clearly erroneous" under the standards of Rule 52 F.R. Civ. P., but for the reasons that *alternative remedies* were apparently not considered by the Board in reaching their decision as to what punishment was proper.

Petitioners, in discussing the evidence of each student, concede that specific charges of misconduct were made and substantiated by the investigative report of Mr. Hershall Turner, principal of the Fairfield High School. It is respectfully submitted that an argument on appeal which merely suggests alternative remedies while not disputing the substantial evidence of the record does not sustain the burden of proof necessary to show reversible error. *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961). The facts presented to support the charges against each student were meticulously developed, carefully documented and openly presented by the principal of the high school. In each case, full disclosure was made to the student, and each of the 21 students was given full opportunity to dispute or deny the factual allegations made. Based on the testimony given, the Board carefully measured the punishment appropriate under the circumstances in each case. In this there was no error. *Linwood v. Board of Education, City of Peoria, School District No. 150, Illinois*, 463 F. 2d 763, 770 (7th Cir. 1972).

II

Where Students Charged With Academic Misconduct Are Given (1) Fair Notice of a Disciplinary Hearing, (2) Specific Statement of the Charges Against Them, (3) a Full Hearing With the Right to Examine and Present Evidence With the Assistance of Counsel, the Requirements of Due Process Are Satisfied.

The procedure followed in the disciplinary hearing of this case was discussed by counsel on both sides, explained to all students collectively, and to each student individually as (s)he was called before the Board members. The procedure followed was set forth at the beginning of the hearing:

"(Off-Record Discussion)

"Mr. Sweeney: I wanted to read a short statement from the leading school disciplinary case which I have always found instructive and its edict of the Court system followed since 1960, *Dixon v. Alabama State Board of Education.* 'School officials and officials should be careful in receiving evidence against the students. They should weigh it, determine whether it comes from a source tainted with prejudice, determine the likelihood by all surrounding circumstances as to who is right, and then act upon it as jurors with calmness, consideration, and fair minds. When they have done this and reached a conclusion, they have done all that the laws require of them to do. We think that students should be informed as to the nature of the charges, as well as the names of at least the principal witnesses against him when requested, and given a fair opportunity to make his defense. He cannot claim the privilege of cross-examination as a matter of right. The testimony against him may be oral or written, not necessarily under oath, but he should be advised as to the nature as well as to the persons who have accused him.'

"Let me ask you if this procedure will be agreeable. We will call each student from outside into the conference room with his parent or guardian. We will explain to the child what he has been charged with, and ask him if it is clear in his mind what school rules he has violated. If he has no questions, we will then present the evidence against the child to support the accusations. Having done that, we will ask the student if he has anything to say to contradict the charges that have been made against him, or the evidence to support charges that have been made against him. After that we will—I think the Board should ask the School Administrator that is presenting the evidence any—and the child—any questions that you think are relevant in order to resolve any conflict. We're going to accord Mr.

Newton the privilege of cross-examination. It is not a right that he can insist on, but we are showing him that courtesy. After the Board, after the school and the child have presented whatever evidence they want, then we will excuse the child and go on to the next student. Is that an agreeable process?" (Tr. 6-8)

In adopting the procedure followed, the Fairfield Board of Education conformed to the standards established by this Court in *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961) and subsequently followed by courts throughout the Federal system. See *Pervis v. LaMarque Independent School System*, 466 F. 2d 1054, 1058 (5th Cir. 1972); *Duke v. North Texas State University*, 469 F. 2d 829 (5th Cir. 1973); *Williams v. Dade County School Board*, 441 F. 2d 299 (5th Cir. 1971); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Davis v. Ann Arbor Public School*, 313 F. Supp. 1217 (E.D. Michigan, 1970); *Esteban v. Central Missouri State College*, 277 F. Supp. 649 (W.D. Mo. 1967), affirmed 415 F. 2d 1077, Blackmun, J. (8th Cir. 1969); *"General Order On Judicial Standards of Procedure In Substance In Review Of Student Discipline,"* 45 F.R.D. 133 (1968).

While the Supreme Court has written no inflexible blueprint for all school disciplinary hearings, the essential procedural safeguards have been stated to include the following, "Three minimal requirements apply in cases of severe discipline, growing out of fundamental conceptions of fairness implicit in the procedural due process. *First*, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based. *Second*, the student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanation and evidence. The *third* requirement is that no disciplinary action be taken on grounds which are not supported by any substantial evidence."

45 F.R.D. 133, 135 (1968). See also *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Davis v. Ann Arbor Public School System*, 313 F. Supp. 1217-1225 (E.D. Mich. 1970); *Scoggin v. Lincoln University*, 291 F. Supp. 161, 171 (W.D. Mo. 1968).

Petitioners do not question the general features of the procedure followed by the Fairfield Board, for the reason that the Board made every effort to conform to the requirements established by this Court. Petitioners question only that aspect of the hearing which related to the presentation of the evidence.

The principal of the Fairfield High School, Mr. Hershell Turner, investigated each charge brought and then presented to the Board the result of his investigation. In several instances, the report involved incidents witnessed by Mr. Turner, himself, and in others, the reports referred to attendance records and reports given to Mr. Turner by the teachers involved. Petitioners contend that none of this information was admissible under strict rules of evidence. This position is urged notwithstanding Mr. Turner's personal knowledge of the facts presented, and notwithstanding the fact that he was subjected to extensive cross-examination by counsel for the students in every case. In other words, Petitioners challenged this procedure not on the substantive grounds of *fairness* since they were allowed to develop fully the basis for the charges, but on the technical evidentiary grounds of hearsay.

In *Davis v. Ann Arbor Public Schools*, 313 F. Supp. 1217 (E.D. Mich. 1970), the Court rejected this same type of technical objection; at page 1227, the Court observed:

> "Plaintiff attacks, also, the proceedings before the Board of Education. He complains that there was no 'dialogue', as he puts it, before the Board, with respect to a list of charges against him. What the Plaintiff apparently envisions as required by administrative due process is some-

thing similar to an indictment, containing various counts, concerning which he will be tried by the Board of Education, with cross-examination of witnesses and the other attributes of judicial proceedings.

"The plaintiff misconceives the law. The opinion in the case of Dixon v. Alabama State Board of Education, *supra*, among others, takes care to point out the indisputable fact that 'A full dress judicial hearing, with the right to cross-examine witnesses, is not required for due process. Such a procedure, as well as the other panoply of judicial proceedings, such as discovery, challenges to the competency of the hearing officers, and the other requirements of either a civil or a criminal trial, would be totally at variance with the student-school relationship, would impose intolerable administrative burdens on the scholastic community, and would be disruptive of the very function the school is created to accomplish, namely, the impartation and acquisition of knowledge in a calm, orderly, and reflective atmosphere."

Petitioners were given the opportunity to develop the extent of Mr. Turner's investigation and knowledge concerning each charge. Petitioners were given the opportunity to rebut this testimony since each student listened to the charges and supporting information presented against them by Mr. Turner. Thus, Petitioners were given every right required by the Fourteenth Amendment as interpreted by the Courts.

CONCLUSION

For the reasons previously stated, the Order of the Court below should be affirmed. This appeal presents no substantial question for review or reconsideration.

Respectfully submitted

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Certificate of Service

I hereby certify that copies of the above and foregoing Brief have been served upon counsels for Appellants via first class mail, postage prepaid, this 21st day of May, 1973.

Original Signed by

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